No. 43216-1-II

COURT OF APPEALS, DIVISION TWO,

OF THE STATE OF WASHINGTON

CLALLAM COUNTY 11-1-00156-2

STATE OF WASHINGTON,

Respondent/Plaintiff,

vs.

MICHAEL JOSEPH MOYLE,

Appellant/Defendant.

BRIEF OF RESPONDENT

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PROCEEDINGS BELOW

On January 23, 2012, the State filed an amended information (CP 212-215, *Appendix A)* that charged Mr. Moyle with seven separate counts involving four victims. County I charged him with ASSAULT OF A CHILD IN THE SECOND DEGREE, committed against A.B. Count II charged him with VEHICULAR ASSAULT committed against A.B. Count III charged him with ASSAULT IN THE SECOND DEGREE, committed against T.B., Tawney Baker. Count IV charged him with VEHICULAR ASSAULT committed against Tawney Baker. County V charged him with ASSAULT OF A CHILD IN THE SECOND DEGREE, committed against L.B. Count VI charged him with ASSAULT IN THE SECOND DEGREE, committed against S.B., Stewart Baker. Count VII charged him with HIT AND RUN INJURY ACCIDENT.

The Jury found Mr. Moyle guilty of all seven counts. (CP 114-122). The Court vacated Counts II and IV

because of double jeopardy concerns (CP 33). Mr. Moyle was sentenced on Counts I, III, V, VI and VII. This appeal followed.

STATEMENT OF THE CASE

On April 13, 2011, Tawny Baker was a passenger in a vehicle driven by her son, Stewart Baker (1/24/2012 RP 51). Another son, A.B.[1], and her granddaughter, L.B.[2]. were passengers in the back seat (1/24/2012 RP 51). Stewart Baker, the father of L.B., was driving from the Albertsons' parking lot in Port Angeles, Clallam County, Washington (1/24/2012 RP 78) when Michael Moyle was pulling in (1/24/2012 RP 51). Tawny Baker saw the black car turn around and begin chasing them on Laurel and Stewart Streets (1/24/2012 RP 52). Both vehicles were going very fast and then her son's vehicle was "smashed into real hard" from behind twice (1/24/2012 RP 52). The first hit folded her five year old son A.B.'s car seat in half

[1] A.B. was born 2/24/2006. (1/24/2012 RP 51).
[2]. L.B. was born 5/21/2008. (1/24/2012 RP 64).

(1/24/2012 RP 52). The second hit, "which was tremendous," sent her vehicle into a telephone pole (1/24/2012 RP 52). Two bones shattered in her arm, she received a head injury (1/24/2012 RP 52), and is permanently disabled in her arm and thumb (1/24/2012 RP 54). She still faces surgery for a broken sternum and 3 broken ribs, and now has a hiatal hernia (1/24/2012 RP 62).

Stewart Baker testified he was leaving Albertsons' parking lot on April 13, 2012 when a black Mustang pulled into the parking lot (1/24/2012 RP 65). He was eye to eye with the other driver. The other driver's "hands went up and his eyes bulged out of his head, he looked – angry." He had never seen him before (1/24/2012 RP 65). The driver of the black Mustang quickly spun his vehicle around and began following Baker's vehicle (1/24/2012 RP 66). The black Mustang began passing cars and then rammed into the back of Baker's vehicle

(1/24/2012 RP 66). Baker's vehicle was pushed into a pole (1/24/2012 RP 67). Mr. Baker was unsure how many times his vehicle was rammed (1/24/2012 RP 71). The other driver kept driving after Mr. Baker's vehicle came to rest (1/24/2012 RP 73). Mr. Moyle did not come back afterward and give his insurance information or his name (1/24/2012 RP 73).

David Killeen, a Washington State Patrol accident reconstructionist at the time of the collision (1/24/2012 RP 115), testified about what he believed happened. By reviewing State's exhibits 3 through 50, 53 through 59, and the measurements taken by Trooper Ellefson (1/24/2012 RP 119, Ex 3-50, 53-59), he created a diagram of the collision (1/24/2012 RP 120, Ex 64). He did not determine the exact street location where Mr. Moyle rammed Mr. Baker's vehicle (1/24/2012 RP 127). The impact pushed Mr. Baker's vehicle to the right. The Mustang continued straight, but began braking. Mr.

Baker swerved in front of the black Mustang and then Mr. Baker overcorrected to the right. The overcorrection caused his vehicle to rotate clockwise and impact with the power pole slightly behind the driver's door. (1/24/2012 RP 128-129). Trooper Killeen calculated the speed at collision was 76 miles an hour (1/24/2012 RP 138).

Another witness, a Mr. Ted Wanner, testified he believed Mr. Baker caused the collision because he had attempted to cut the black Mustang off (1/24/2012 RP 33). Trooper Killeen disagreed because the only impact damage to either vehicle was in the rear of Mr. Baker's vehicle and in the front area of Mr. Moyle's vehicle (1/24/2012 RP 130). He believed Mr. Wanner saw only the end of the collision (1/24/2012 RP 130). Trooper Killeen showed that Mr. Baker's vehicle was shoved to the right by the collision, then swerved to the left, overcorrected to the right and hit the pole (1/24/2012 RP 138-39).

Dr. Bradley Bringgold, an emergency room doctor at Olympic Medical Center (1/25/2012 RP 6,7) treated the injured people. A.B. suffered multiple injuries. The most serious injury was a fracture to the upper portion of the tibia in his left leg (1/25/2012 RP 8). He also received a head injury, a concussion. The head injury created concerns about whether he was going to be able to safely control his airway. He was airlifted from the medical center to a Seattle hospital (1/25/2012 RP 8). L.B. suffered from bruises and scrapes.

Detective Spencer from the Port Angeles Police Department located items in the vehicle showing the vehicle belonged to Michael Moyle (1/25/2012 RP 40). Detective Malone, also with the Port Angeles Police Department, interviewed Mr. Moyle (1/25/2012 RP 43). Mr. Moyle admitted leaving the collision scene without assisting the Bakers because "Tim Smith" told him it was okay (1/25/2012 RP 45). Mr. Moyle said he knew he was

supposed to stay but he was in trouble for "this other thing" (1/25/2012 RP 51).

Mr. Moyle testified on his own behalf (1/26/2012 RP 5):

> I remember, um, pulling into Albertson's parking lot. As I was pulling out of the parking lot, I was going over a speed bump and another car's coming towards me. And as I looked over, I looked in the driver's side window I saw this face, and when I saw that face I just freaked out, I snapped or something and I turned around -- and all I remember is turning around, passing a couple of people and running into the back of a car and, um, I seen the car seats come up. And that's when I started to come to, and as I was coming to I just coasted -- I just coasted to a stop and thinking what have I done, what have I done. And, uh, I didn't know what to do. I got out of my car and started going back to the scene of the incident to make sure everybody was okay because I thought I killed some people. And, um, as soon as I -- I went around a bus and the bus driver asked if I was going to help them and I said yes and I was going towards the incident and Mr. Tim Smith came up over the hill and said everything was fine, everything was fine, I could go to work, I could go to work. And I felt relieved. So I did. I was just distraught, I didn't know what to do so I just listened to what he said. And I took off back to my car. I got in my car and tried to start it but it wouldn't start. And Tim Smith came up beside me and I jumped in his vehicle and we took -- he took off...

(1/26/2012 RP 6-7).

Dr. Joseph Nevotti, a licensed psychologist in private practice in Washington State(1/25/2012 RP 55) testified for Mr. Moyle. He testified Mr. Moyle suffers from

three mental disorders[3], the most prominent one at the time of the interviews being "acute stress disorder" (1/25/2012 RP 71). The doctor defined "acute stress disorder" as follows:

> [A]cute stress disorder in a nutshell is related to -- some say it's a precursor to PTSD. Acute stress disorder is a -- basically what it means is that the individual was exposed to a potentially life threatening situation and that he or she reacted in terror or horror, they truly believed that their life was at stake and that they were going to be seriously injured, if not killed. And with regard to ASD, acute stress disorder, as a result of the trauma, the individual suffers a number of symptoms.

(1/25/2012 RP 71). The first symptom is "dissociative symptoms" commonly called "flashbacks" (1/25/2012 RP 72). About half of all Americans experience some sort of traumatic stress disorder but not all develop it (1/25/2012 RP 73). Only about 8% continue to display symptoms over time (1/25/2012 RP 73). It can be a precursor to post traumatic stress disorder (1/25/2012 RP 80). He

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[3] Impaired memory function, impaired cognitive ability, and amphetamine dependence.

testified avoidance is the second criteria. People who have had a flashback commonly avoid situations that trigger the intrusive thoughts (1/25/2012 RP 75). Increased anxiety is the third criteria, including difficulty sleeping, irritability, poor concentration, and exaggerated startle response (1/25/2012 RP 75). "Acute stress disorder" differs from post traumatic stress disorder in that it must, definitionally, occur within 2 days of the assault or the trauma and last no more than 4 weeks (1/25/2012 RP 80).

Mr. Moyle complained of "flashbacks" that he could not resolve (1/25/2012 RP 76). After providing Mr. Moyle with a series of outdated tests, he concluded Mr. Moyle suffered from memory deficits (1/25/2012 RP 101). Because Mr. Moyle tested so poorly on the memory tests, the doctor concluded he would have trouble forming intent, particularly with a history of substance abuse, flashbacks and anxiety (1/25/2012 RP 108). A person

with his memory issues would behave impulsively, shoot from the hip, jump to conclusions, etc. (1/25/2012 RP 109). They are less likely to consider their action's potential consequences or other better alternatives (1/25/2012 RP 110).

Dr. Jolene Simpson, a staff psychologist at Western State Hospital, testified in rebuttal (1/26/2012 RP 29). She began by stating Dr. Nevotti's use of and reliance on outdated testing materials raised ethical issues. Updated versions of the testing sometimes revised questions and "norming." Results from earlier versions of testing are considered less reliable and therefore less ethical (1/26/2012 RP 35). Other more sensitive and updated measures exist to test cognitive impairment than the TOMM's test, used by Dr. Nevott (1/26/2012 RP 36).

Dr. Simpson did not agree that Michael Moyle was significantly mentally impaired. Mr. Moyle tested in the 26th percentile on the Wechsler test; she learned from

another hospital neuropsychologist that the result actually falls within the average range of what would be expected (1/26/2012 RP 39). Her diagnosis was "amphetamine dependence in a controlled environment, cannabis dependence in a controlled environment, alcohol abuse in a controlled environment, as well as I gave a rule out diagnosis of acute stress disorder by history, by report. And I also gave a diagnosis of personality disorder not otherwise specified with antisocial features with a rule out of antisocial personality disorder" (1/26/2012 RP 39-40). The personality disorder not otherwise specified with antisocial features was based upon personal history given by Mr. Moyle. His history demonstrated an "ongoing pattern of aggressive and violent behavior combined with violating the laws and violating or harming other people" (1/26/2012 RP 41).

Dr. Simpson also testified that Mr. Moyle did not meet the criteria for Acute Stress Disorder (1/26/2012 RP

42). After pointing out there are ten criteria that must be met for this diagnosis, she began to list the criteria Mr. Moyle did not meet. He did not meet criteria "B", numb emotionally: "[B]eing in a daze, kind of like watching someone outside themselves. Feeling like the world around them isn't real. And having problems recalling specific parts of the traumatic event. And I didn't find evidence per Mr. Moyle report that he had 3 of these symptoms" (1/26/2012 RP 44). She agreed he experienced "flashbacks" but found no evidence he avoided stimuli (1/26/2012 RP 45). She also found no evidence that he was hyper vigilant because of the alleged attack (1/26/2012 RP 45). He presented nothing to her to show the traumatic event made him unable to function. He reported he did not remember any specific problems during the days following the alleged incident of April 10th (1/26/2012 RP 46). She also found no evidence his heightened awareness from the alleged robbery lasted

two days, a necessity for this diagnosis (1/26/2012 RP 46). Finally, she addressed the effects of his drug use. Mr. Moyle told her he used methamphetamine an hour or two after he was attacked, so "it's possible that some of his increased arousal could have been attributed to the drug use, but I'm not really sure" (1/26/2012 RP 47). She did not find "evidence of an impairment that would make it so that he could not participate in intentional, goal directed and personal action" (1/26/2012 RP 48).

During rebuttal closing argument, the following exchanges occurred:

> Vehicular assault, intent -- the standard is recklessness and you'll have that definition. And as far as hit and run, the standard is knowledge. Those charges do not require consideration on your part as to whether the defendant was capable of forming intent. Those charges are conceded. So, solely pertaining to the charges of assault 2nd degree and assault of the child in the 2nd degree, I want you to consider basically whether it would be reasonable for you to believe the Defense's theory because the standard is reasonable doubt. First, let's look at --
>
> MR. OAKLEY: Objection, that misstates the law.

MS. LUNDWALL: It's my burden to prove to you each element of those charges beyond a reasonable doubt. So I'm going to look first at the reasonableness of the Defendant's story about what happened to him on April 10th, 2011. And again, this will be something you can take back -- you are the sole judges of the credibility of the witnesses.

MR. OAKLEY: Your Honor, again I object, that misstates the law.

THE COURT: What misstates the law?

MR. MR. OAKLEY: The defense does not have to be reasonable. All the defense has to do is raise a reasonable doubt, a doubt for which a reason exists. Doesn't have to be more likely than not, doesn't even have to be rational.

THE COURT: I think that's what she indicated. She indicated what the burden to the State is and she's asking the jury to look at what the Defendant's position is. So I think it's proper.

MS. LUNDWALL: All right. And again, I don't want there to be any misunderstanding. It is my burden to prove each element beyond a reasonable doubt.

(1/26/2012 RP 120-21).

Ladies and gentlemen, is it reasonable for you to believe under the circumstances that the Defendant –

MR. OAKLEY: Objection, this is improper argument.

THE COURT: I don't believe it is, overruled.

(1/26/2012 RP 124).

The jury found Mr. Moyle guilty on all counts (CP 114-122). The jury also found he drove a motor vehicle in a reckless manner and with a disregard for the safety of others in count II and count IV (CP 114, 115). The Court vacated counts II and IV on March 15, 2012 (CP 33); only counts I, III, V, VI and VII remain for review. This appeal followed.

ARGUMENT

ISSUE ONE

Where the Defendant admits all the elements of the crimes charged except intent, did the State provide sufficient evidence from which any rational trier of fact could have found the elements of the crime, including his ability to form intent, beyond a reasonable doubt?

A. THE STATE PRESENTED AMPLE EVIDENCE PROVING MR. MOYLE HAD THE ABILITY TO FORM INTENT.

1. STANDARD OF REVIEW:

The test for reviewing a defendant's challenge to the sufficiency of evidence in a criminal case is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt". *State v. Gentry,* 125 Wn.2d 570, 596–97, 888 P.2d 1105 (1995), *cert. denied,* 516 U.S. 843, 116 S.Ct. 131, 133 L.Ed.2d 79; *State v. Green,* 94 Wn.2d 216, 221–22, 616 P.2d 628 (1980) (following *Jackson v. Virginia,* 443 U.S. 307, 318, 99 S.Ct. 2781, 2788, 61 L.Ed.2d 560 (1979)). All reasonable inferences from the evidence are drawn in favor of the State. *Gentry,* 125 Wn.2d at 597, 888 P.2d 1105.

State v. Pirtle, 127 Wn.2d 628, 643, 904 P.2d 245 (1996).

2. ARGUMENT:

The State provided evidence beyond a reasonable doubt that Mr. Moyle had the capacity to form intent. A licensed psychologist set out ten criteria a person must meet to qualify for Acute Stress Disorder. She agreed Mr. Moyle had "flashbacks." On the other hand, she saw nothing that showed he was numb emotionally, "feeling like the world is not real." He presented nothing to show the alleged robbery on April 10, 2011, was so invasive it

created problems recalling specific parts of the event. She found nothing to show he avoided stimuli, a major part of Dr. Navotti's test.

Mr. Moyle did not tell Dr. Simpson that he had problems functioning after the alleged assault. This is another major criteria, cited as important by both experts.

Dr. Simpson found nothing supporting the criteria that he had a heightened awareness following the alleged assault. Dr. Navotti did not address the criteria. Finally, she noted that he admitted using methamphetamine within two hours of the alleged attack, which itself could explain why he attacked the Bakers. Her testimony about what she observed about Mr. Moyle was more than sufficient to permit a reasonable trier of fact to find evidence of the ability to form intent beyond a reasonable doubt.

Nothing presented by Mr. Moyle diminished the capacity evidence presented by the State. Dr. Navotti

cited three criteria for Acute Stress Disorder: "Flashback," avoidance, and an increase in anxiety. He testified about only one: "Flashbacks." Instead, he tested Mr. Moyle for "memory deficits" and concluded his use of drugs and other anxiety led to poor decision making. Dr. Nevotti never showed that Mr. Moyle avoided confrontation. He also did not clearly explain the "other anxiety." Dr. Nevotti correctly determined that Mr. Moyle is a drug addict.

The evidence clearly showed Mr. Moyle did not meet the criteria of Acute Stress Disorder. It also showed that Mr. Moyle did not suffer from mental issues that impaired his ability to form intent.

ISSUE TWO

Where the jury was provided with "to convict" instructions that explained to the jury that one element the State must prove is SECOND DEGREE ASSAULT, and where the definition of SECOND DEGREE ASSAULT is also provided to the jury, are the instructions correct when read as a whole?

B. THE TRIAL COURT DID NOT RELIEVE THE STATE OF ITS BURDEN TO PROVE EACH ELEMENT OF THE CRIMES BEYOND A REASONABLE DOUBT.

1. STANDARD OF REVIEW:

An alleged error in jury instructions is reviewed de novo. *State v. Sibert,* 168 Wn.2d 306, 311, 230 P.3d 142 (2010) citing to *State v. Becklin,* 163 Wn,2d 519, 525, 182 P.3d 944 (2008).

> "Therefore, "a 'to convict' [jury] instruction must contain all of the elements of the crime because it serves as a 'yardstick' by which the jury measures the evidence to determine guilt or innocence." *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997) (quoting *State v. Emmanuel*, 42 Wash.2d 799, 819, 259 P.2d 845 (1953)). We are not to look to other jury instructions to supply a missing element from a "to convict" jury instruction. Id. at 262–63, 930 P.2d 917."

State v. Sibert, id., page 311, 230 P.3d 142.

A challenged jury instruction is evaluated in the context of the whole set of instructions. *State v. Benn,* 120 Wn.2d 631, 654–55, 845 P.2d 289 (1993). "Even if an instruction may be misleading, it will not be reversed unless prejudice is shown by the complaining party."

State v. Aguirre, 168 Wn.2d 350, 363–64, 229 P.3d 669 (2010).

2. ARGUMENT:[4]

Mr. Moyle appears to argue that the "to convict" instructions[5] are improper because the actual language of RCW 9A.36.021[6] is not included in each of them. Instruction 12 provided the relevant portion of RCW 9A.36.021 to the jury.[7] The jury had the definition of

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[4] There was no challenge to the instructions below. The State does not concede the claimed error encompasses a manifest abuse of discretion because the instructions are complete when read as a whole.

[5] *Appendix B*

[6] (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

(b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or

(c) Assaults another with a deadly weapon; or

(d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or

(e) With intent to commit a felony, assaults another; or

(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or

(g) Assaults another by strangulation or suffocation.

[7] "A person commits the crime of ASSAULT IN THE SECOND DEGREE when he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm or assaults another with a deadly weapon."

SECOND DEGREE ASSAULT to review each time it looked at the "to convict" instructions. The jury instructions are complete, correct and, when read as a whole, provide clear guidance to the jury. There is no error.

Moreover, even if each "to convict" instruction should have included the actual definition of SECOND DEGREE ASSAULT, the instructions are still complete as a whole. *Williams* held that instructions are sufficient if other information informs the jury about the facts necessary to prove the charge. Like *Williams,* the jury in this matter was made acutely aware of the elements of Second Degree Assault. The charging language, the evidence presented by both sides, and the arguments of counsel ensured the jury was aware of each element it must find to convict Mr. Moyle. There is no error or, if there is error, it is harmless beyond a reasonable doubt.

ISSUE THREE

When the jury is charged with a crime for which there are alternative means, is there sufficient evidence to convict when the record contains evidence beyond a reasonable doubt as to each means?

C. A JURY UNANIMITY INSTRUCTION IS UNNECESSARY IF EACH ALTERNATIVE IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. STANDARD OF REVIEW:

Second Degree Assault is not an alternative means crime. *State v. Smith*, 159 Wn.2d 778, 154 Wn.2d 873 (2007) overruled all prior decisions that treat second degree assault as an alternative means crime. A unanimity instruction is therefore unnecessary but substantial evidence must support each form of assault. *State v. Smith,* 124 Wn.App. 417, 102 P.3d 158 (2004), *affirmed* 159 Wn.2d 778, 154 Wn.2d 873 (2007).

B. ARGUMENT:

Substantial evidence supports each alternative form of assault. Two alternatives were presented to the jury:

1. Assault with a deadly weapon;

2. Assault that recklessly inflicts substantial bodily harm.

Mr. Moyle admitted he rammed the Baker vehicle. He did not deny his vehicle was a deadly weapon. He also admitted that two people in the Baker vehicle suffered substantial bodily harm. The remaining issue is whether he acted intentionally. The State provided evidence beyond a reasonable doubt that he had the capacity to act intentionally. Therefore, each charge of assault is supported by substantial evidence.

ISSUE FOUR

When the Defendant claims he could not form the intent to commit an assault because he was under the influence of a "flashback" but showed no other signs of Acute Stress Disorder, did the State correctly challenged his version of events?

D. THE STATE DID NOT ERR IN QUESTIONING WHETHER THE EXPLANATION PROVIDED BY MR. MOYLE WAS REASONABLE.

A. STANDARD OF REVIEW:

A defendant who claims a prosecutor committed misconduct must establish both that the conduct was improper and prejudicial in the context of the entire trial record. *State v. Thorgerson,* 172 Wn.2d 438, 442, 258 P.3d 43 (2011). The defendant must prove that "there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict." *Id,* quoting *State v. Magers,* 164 Wn.2d 174, 191, 189 P.3d 126 (2008). A prosecutor may not argue that the burden of proof rests with the defendant. On the other hand, a prosecutor has wide latitude to argue reasonable inferences from the evidence. *Id.* at page 453.

B. ARGUMENT:

State v. Thorgerson, Id., is directly on point. Mr. Thorgerson asserted the prosecutor shifted the burden of proof in closing argument. The Court disagreed. It reviewed the prosecutor's statements in the context of the

case at trial and held the argument was acceptable. First, it concluded the prosecutor presented fair argument in response to testimony presented by the defendant. The Court noted the defendant expended considerable time and effort attempting to establish inconsistencies in the victim's testimony. This permitted the prosecutor to present argument that the victim had been consistent over the past year. *Id.,* page 453. Further, the Court refused to find the prosecutor committed misconduct by informing the jurors they should believe the victim and, if they believed the victim, they should convict the defendant, if they found evidence beyond a reasonable doubt. *Id.,* page 454.

Thorgerson applies here. Because Mr. Moyle presented a diminished capacity defense, the State had wide latitude to address his assertions, so long as it did not place any burden on him. The State was entitled to ask the jury to consider whether Mr. Moyle's explanation

for why he assaulted the Bakers was reasonable. The State only argued that Mr. Moyle's explanation was not reasonable, not that Mr. Moyle had any burden.

Second, the *Thorgerson* Court stated the prosecutor clearly explained to the jury that the State bears the burden of proof. *Id.,* pages 453-54. In Mr. Moyle's case, the State asserted more than once that it had the burden of proof. The trial court also instructed the jury that it is the State's burden to prove each element of the crime charged beyond a reasonable doubt. Instruction 5, CP 131, *Appendix B.*

Mr. Moyle was relying on a diminished capacity defense. Diminished capacity is an affirmative defense only to the extent that the defendant carries the burden of producing sufficient evidence of diminished capacity to put the defense at issue. *State v. Carter,* 31 Wn. App. 572, 575, 643 P.2d 916 (1982) (citing W. LaFave & A. Scott, Criminal Law ss 8, 45 (1972)).

Although diminished capacity raises factual issues regarding the defendant's ability to form the requisite *mens rea* for the charged crime, the State retains the ultimate burden of proving the requisite mental state beyond a reasonable doubt. *State v. James*, 47 Wn. App. 605, 609, 736 P.2d 700 (1987).

Put simply, diminished capacity evidence is the same as any other relevant evidence. If the foundation is laid, the evidence is presented to the jury. Once the evidence has been admitted, the State has every right to challenge the evidence. When the State argued to the jury that Mr. Moyle's explanation was not reasonable, it was merely challenging his evidence. There was no misconduct.

Even if there is error, however, it is harmless. The State does not concede it acted improperly, but any error was minor in context of the entire record and the circumstances at trial. The defendant must prove that

"there is a substantial likelihood [that] the misconduct affected the jury's verdict." *State v. Thorgerson, supra,* 443, 258 P3d 43. Mr. Moyle claimed he "blanked out." The State only asked the jury to consider, in light of all the facts, whether Mr. Moyle's explanation was reasonable. Coupled with the State's reminder about the State's burden of proof, it is hardly likely any juror was affected by the question.

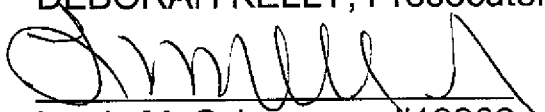
CONCLUSION

This Court should affirm Mr. Moyle's convictions. The Jury had ample evidence from which to decide that Mr. Moyle had the capacity to form intent on the day he rammed Mr. Baker's vehicle, permanently disabling Mr. Baker's mother and giving his brother a serious head injury. The instructions read as a whole show the pathway to the jury to find each element the State needed to prove. The State never relinquished the burden of proof at any time and merely asked the jury to consider

the reasonableness of Mr. Moyle's explanation. Mr. Moyle was correctly convicted. His conviction should be affirmed.

Respectfully submitted this 2 day of November, 2012.

DEBORAH KELLY, Prosecutor

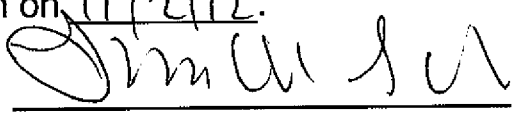


Lewis M. Schrawyer, #12202
Deputy Prosecuting Attorney
Clallam County

APPENDIX A
APPENDIX B

CERTIFICATE OF DELIVERY

The undersigned swears or affirms that a true and accurate copy of this document was provided to Lise Ellner, Attorney at Law, at her address of record by electronic transmission on 11/2/12.



APPENDIX A

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BARBARA CHRISTENSEN

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLALLAM

SCANNED

STATE OF WASHINGTON,

Plaintiff,

vs.

MICHAEL J. MOYLE,

Defendant(s).

NO. 11-1-00156-2

AMENDED (AMINF)

[XX] CRIMINAL INFORMATION
[ ] CRIMINAL COMPLAINT (INFO)

FOR: **Count I: ASSAULT OF A CHILD IN THE SECOND DEGREE - DEADLY WEAPON AND INTENTIONAL ASSAULT/ RECKLESS INFLICTION OF SUBSTANTIAL BODILY HARM; Counts II and IV: VEHICULAR ASSAULT - ALTERNATIVES; Count III: ASSAULT IN THE SECOND DEGREE - DEADLY WEAPON AND INTENTIONAL ASSAULT/ RECKLESS INFLICTION OF SUBSTANTIAL BODILY HARM; Count V: ASSAULT OF A CHILD IN THE SECOND DEGREE – DEADLY WEAPON; Count VI: ASSAULT IN THE SECOND DEGREE - DEADLY WEAPON; Count VII: HIT AND RUN INJURY ACCIDENT**

I, ANN LUNDWALL Deputy Prosecuting Attorney for the State of Washington in the venue of Clallam County, come now in the name of and by the authority of the State of Washington and by this Information/Complaint do accuse the above-named Defendant(s) of the following crime(s), committed as follows:

COUNT I: ASSAULT OF A CHILD IN THE SECOND DEGREE - DEADLY WEAPON AND INTENTIONAL ASSAULT/RECKLESS INFLICTION OF SUBSTANTIAL BODILY HARM

On or about the 13th day of April, 2011 , in the County of Clallam, State of Washington, the above-named Defendant, then being a person eighteen years of age or older, did intentionally assault a child, to-wit: A.B., who at the time of the assault was under the age of thirteen years, and thereby recklessly inflict substantial bodily harm, and/or did intentionally assault a child, to-wit: A.B., who at the time of the assault was under the age of thirteen years, with a deadly weapon, to-wit: a motor vehicle; contrary to Revised Code of Washington

PAPD No. 10-20762

cc: Jail (new in-custody)

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9A.36.130(1)(a) and 9A.36.021(1)(a) and/or (c), a Class B felony.

Maximum Penalty - Ten (10) years imprisonment and/or a $20,000.00 fine pursuant to RCW 9A.36.130(2) and RCW 9A.20.021(1)(b), plus restitution and assessments.

(If the defendant has previously been convicted on two separate occasions of a "most serious offense" as defined by RCW 9.94A.030(32), in this state, in federal court, or elsewhere, the mandatory penalty for this offense is life imprisonment without the possibility of parole pursuant to 9.94A.030(32)(a) and 9.94A.120(4) or 9.94A.570.)

COUNT II: VEHICULAR ASSAULT - ALTERNATIVES

On or about the 13th day of April, 2011, in the County of Clallam, State of Washington, the above-named Defendant did cause substantial bodily harm to another, to-wit: A.B., and did (1) operate or drive a vehicle in a reckless manner and/or (2) operate or drive a vehicle with disregard for the safety of others; contrary to Revised Code of Washington 46.61.522(1) (Laws of 2001, ch. 300, § 1), a Class B felony;

Maximum Penalty - Ten (10) years imprisonment and/or $20,000.00 fine, or both, pursuant to RCW 46.61.522 and RCW 9A.20.021(1)(b), plus restitution and assessments.

(If the Defendant is convicted of operating the vehicle in a reckless manner and the Defendant has previously been convicted on two separate occasions of a "most serious offense" as defined by RCW 9.94A.030(24), in this state, federal court, or elsewhere, the mandatory penalty for this offense is life imprisonment without the possibility of parole pursuant to RCW 9.94A.030(32)(a) and 9.94A.120(4) or 9.94A.570.)

COUNT III: ASSAULT IN THE SECOND DEGREE - DEADLY WEAPON AND INTENTIONAL ASSAULT/RECKLESS INFLICTION OF SUBSTANTIAL BODILY HARM

On or about the 13th day of April, 2011, in the County of Clallam, State of Washington, the above-named Defendant did intentionally assault another person, to-wit: T.B., and thereby recklessly inflict substantial bodily harm, and/or did intentionally assault another person, to-wit: T.B. with a deadly weapon, to-wit: a motor vehicle; contrary to Revised Code of Washington 9A.36.021(1)(a) and/or (c), a Class B felony.

Maximum Penalty - Ten (10) years imprisonment and/or a $20,000.00 fine pursuant to RCW 9A.36.021(2) and RCW 9A.20.021(1)(b), plus restitution and assessments.

(If the defendant has previously been convicted on two separate occasions of a "most serious offense" as defined by RCW 9.94A.030(32), in this state, in federal court, or elsewhere, the mandatory penalty for this offense is life imprisonment without the possibility of parole pursuant to 9.94A.030(32)(a) and 9.94A.120(4) or 9.94A.570.)

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COUNT IV: VEHICULAR ASSAULT - ALTERNATIVES

On or about the 13th day of April, 2011, in the County of Clallam, State of Washington, the above-named Defendant did cause substantial bodily harm to another, to-wit: T.B., and did (1) operate or drive a vehicle in a reckless manner and/or (2) operate or drive a vehicle with disregard for the safety of others; contrary to Revised Code of Washington 46.61.522(1) (Laws of 2001, ch. 300, § 1), a Class B felony;

Maximum Penalty - Ten (10) years imprisonment and/or $20,000.00 fine, or both, pursuant to RCW 46.61.522 and RCW 9A.20.021(1)(b), plus restitution and assessments.

(If the Defendant is convicted of operating the vehicle in a reckless manner and the Defendant has previously been convicted on two separate occasions of a "most serious offense" as defined by RCW 9.94A.030(24), in this state, federal court, or elsewhere, the mandatory penalty for this offense is life imprisonment without the possibility of parole pursuant to RCW 9.94A.030(32)(a) and 9.94A.120(4) or 9.94A.570.)

COUNT V: ASSAULT OF A CHILD IN THE SECOND DEGREE – DEADLY WEAPON

On or about the 13th day of April, 2011 , in the County of Clallam, State of Washington, the above-named Defendant, then being a person eighteen years of age or older, did intentionally assault a child, to-wit: L.B., who at the time of the assault was under the age of thirteen years, with a deadly weapon, to-wit: a motor vehicle; contrary to Revised Code of Washington 9A.36.130(1)(a) and 9A.36.021(1)(a) and/or (c), a Class B felony.

Maximum Penalty - Ten (10) years imprisonment and/or a $20,000.00 fine pursuant to RCW 9A.36.130(2) and RCW 9A.20.021(1)(b), plus restitution and assessments.

(If the defendant has previously been convicted on two separate occasions of a "most serious offense" as defined by RCW 9.94A.030(32), in this state, in federal court, or elsewhere, the mandatory penalty for this offense is life imprisonment without the possibility of parole pursuant to 9.94A.030(32)(a) and 9.94A.120(4) or 9.94A.570.)

COUNT VI: ASSAULT IN THE SECOND DEGREE - DEADLY WEAPON

On or about the 13th day of April, 2011, in the County of Clallam, State of Washington, the above-named Defendant did intentionally assault another person, to-wit: S.B., with a deadly weapon, to-wit: a motor vehicle; contrary to Revised Code of Washington 9A.36.021(1)(c), a Class B felony.

Maximum Penalty - Ten (10) years imprisonment and/or a $20,000.00 fine pursuant to RCW 9A.36.021(2) and RCW 9A.20.021(1)(b), plus restitution and assessments.

(If the defendant has previously been convicted on two separate occasions of a "most serious offense" as defined by RCW 9.94A.030(32), in this state, in federal court, or elsewhere, the mandatory penalty for this offense is life imprisonment without the possibility of parole pursuant to 9.94A.030(32)(a) and 9.94A.120(4) or 9.94A.570.)

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COUNT VII: HIT AND RUN INJURY ACCIDENT

On or about the 13th day of April, in the County of Clallam, State of Washington, the above-named Defendant did operate a vehicle which was involved in an accident which resulted in injury to another person, to-wit: A.B., and/or T.B., and or L.B, and knowing that he/she had been involved in the accident the Defendant did fail to (a) immediately stop his or her vehicle at the scene of the accident or as close thereto as possible, and/or (b) forthwith return to or remain at the scene of the accident and give required information, including his or her name, address, and vehicle license number, and display his or her vehicle driver's license to any person struck or injured or the driver or any occupant of, or any person attending, any such vehicle collided with, and/or (c) render reasonable assistance to any person injured in such accident, including the carrying or making of arrangements for the carrying of such person to a physician or hospital for medical treatment if it is apparent that such treatment is necessary or if such carrying is requested by or on behalf of the injured person; contrary to Revised Code of Washington 46.52.020(4)(b), a Class C felony.

Maximum Penalty - Five (5) years imprisonment and/or a $10,000 fine pursuant to RCW 46.52.020(4)(b) and RCW 9A.20.021(1)(c), plus restitution and assessments.

Contrary to the form, force and effect of the statutes in such cases made and provided, and against the Peace and Dignity of the State of Washington.

DATED at Port Angeles, Washington, this 17th day of January, 2012.

MICHAEL J. MOYLE: White Male, DOB 06/10/1982, 6'3", 205 lbs., brown hair, brown eyes, DOC 838208, FBI 765004MB2, SID WA20014162, Address: 920 East Tenth Street, Port Angeles, WA 98362

DEBORAH S. KELLY, Prosecuting Attorney

By: _____
ANN LUNDWALL WBA #27691
Deputy Prosecuting Attorney

AL:ljm

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APPENDIX B

NO. 5

The Defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The Defendant has no burden of proving that a reasonable doubt exists as to these elements.

A Defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

No. 8

Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form intent.

NO. 9

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

NO. 11

Deadly weapon means any weapon, device, instrument, substance, or article including a vehicle, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

NO. 12

A person commits the crime of ASSAULT IN THE SECOND DEGREE when he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm or assaults another with a deadly weapon.

NO. 13

A person commits the crime of ASSAULT OF A CHILD IN THE SECOND DEGREE if the person is eighteen years of age or older and the child is under the age of thirteen and the person commits the crime of ASSAULT IN THE SECOND DEGREE against the child.

NO. 14

To convict the Defendant of the crime of ASSAULT OF A CHILD IN THE SECOND DEGREE as charged in Count I, each of the following elements must be proved beyond a reasonable doubt:

(1) That on or about the 13th day of April, 2011, the Defendant committed the crime of ASSAULT IN THE SECOND DEGREE against A.B.;

(2) That the Defendant was eighteen years of age or older and A.B. was under the age of thirteen; and

(3) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

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NO. 15

To convict the Defendant of the crime of ASSAULT OF A CHILD IN THE SECOND DEGREE as charged in Count V, each of the following elements must be proved beyond a reasonable doubt:

(1) That on or about the 13th day of April, 2011, the Defendant committed the crime of ASSAULT IN THE SECOND DEGREE against L.B.;

(2) That the Defendant was eighteen years of age or older and L.B. was under the age of thirteen; and

(3) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

NO. 16

To convict the Defendant of the crime of ASSAULT IN THE SECOND DEGREE as charged in Count III, each of the following two elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 13th day of April, 2011, the Defendant:

(a) intentionally assaulted T.B. and thereby recklessly inflicted substantial bodily harm; or

(b) assaulted T.B. with a deadly weapon; and

(2) That this act occurred in the State of Washington.

If you find from the evidence that element (2) and either alternative element (1)(a) or (1)(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (1)(a) or (1)(b) has been proved beyond a reasonable doubt, as long as each juror finds that either (1)(a) or (1)(b) has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to either element (1) or (2), then it will be your duty to return a verdict of not guilty.

NO. 17

To convict the Defendant of the crime of ASSAULT IN THE SECOND DEGREE as charged in Count VI, each of the following two elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 13th day of April, 2011, the Defendant assaulted S.B. with a deadly weapon; and

(2) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

CLALLAM COUNTY PROSECUTOR

November 02, 2012 - 1:18 PM

Transmittal Letter

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Case Name: State v. Moyle

Court of Appeals Case Number: 43216-1

Is this a Personal Restraint Petition? ◯ Yes ◉ No

The document being Filed is:

- ◯ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ◯ Statement of Arrangements
- ◯ Motion: ____
- ◯ Answer/Reply to Motion: ____
- ◉ Brief: Respondent's
- ◯ Statement of Additional Authorities
- ◯ Cost Bill
- ◯ Objection to Cost Bill
- ◯ Affidavit
- ◯ Letter
- ◯ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ◯ Personal Restraint Petition (PRP)
- ◯ Response to Personal Restraint Petition
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Comments:

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